U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 16 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a business development manager for Microsoft, Inc.[1] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services (CIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the

[1] On the Form I-140 petition, the petitioner listed his specific title as "Director of International Finance Development" at Microsoft. There is no documentation from Microsoft to confirm this title.

> "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The petitioner submits background documentation to establish the intrinsic merit and national scope of the broadband industry (which allows for the rapid transmission of high volumes of data). At issue is whether the petitioner's individual contribution to this industry rises to a level that merits a special waiver of the job offer requirement that, by law, normally applies to advanced degree professionals in the petitioner's field. We note that the law makes no exceptions to this requirement based solely or primarily on the prestige of a given employer.

Counsel states that the petitioner possesses "extraordinary ability in the area of financial analysis, with a particular expertise in . . . digital content distribution in the broadband industry." The petitioner holds two degrees: a law degree and a master's in business administration.

On his resume, the petitioner describes his recent work at Microsoft:

> Drive the launch and development of Windows home server product line. Sign key go-to-market partners for eHome division; develop and negotiate strategic relationships for eHome's launch. Responsible for success of eHome platform. Develop and cultivate relationships as well as collection and communication of plans between the MS and the eHome partner. Work with leading Consumer Electronic Manufacturers, PC OEMS, and service providers to drive market development efforts by identifying business and partnership opportunities for eHome and related DMD technologies. Drive business discussions. Negotiate terms with potential partners, from simple work-for-hire agreements to complex licenses, alliances, and acquisitions. Deals include licensing of eHome platform, technology licensing for walled garden service development, co-development of platform technologies, sales & marketing partnerships and potential platform investments.

The above description does not mention broadband digital content distribution.

The petitioner submits letters from several witnesses, most of whom know the petitioner from his previous employment at Enron Broadband Services (EBS). The original witnesses do not include any Microsoft officials. [redacted] now a senior vice president at Plains Resources, Inc., was previously a vice president and managing director at EBS. Mr. Bay states:

> [The petitioner] was a key member of the management team developing the strategy and implementation of EBS' content delivery business in the broadband industry.
>
> The business model that [the petitioner] participated in developing was indeed complex: in order to improve the functionality of the Internet, EBS aimed to provide high quality, end-to-end delivery of broadband content by delivering movies to consumers' television sets via digital subscriber line (DSL) technology that sends high-speed data over phone lines, in a similar way to pay-per-view services on cable channels.
>
> [The petitioner] **has developed a unique combination of skills in the broadband industry, including a peerless understanding of complex technical challenges. I submit that his capacity for looking at a traditional problem and producing an original and viable solution makes him an extraordinary asset who has a demonstrated record of success in transforming the way in which consumers access content in their homes**. . . .
>
> [The petitioner] **has a demonstrated record as one who was directly responsible for the innovations in, and development of, digital content distribution systems in the broadband industry. His skills, knowledge, and creativity are clearly measurable and establish him as one of the foremost experts in the world**.

(Emphasis in original.) [redacted] vice president of Global Markets Finance and Structuring at Enron Corporation, states:

> We began a working relationship when [the petitioner] was employed in the International Division at Enron Corporation. . . . He was tasked with studying the feasibility and designing the optimal implementation of various large-scale and complex transactions in the energy sector, which continue to be of critical importance to United States industry at large. . . .
>
> [The petitioner] was instrumental in evaluating international investments and acquisitions in the energy sector, and for performing extensive economic and financial modeling as part of the valuation of foreign energy assets. . . .
>
> Finally, he was responsible for several significant efforts to evaluate potential opportunities to use insurance products to reduce project risk and reduce costs of financing, projects which required an expert ability to understand business critical issues in new markets and to design innovative, unique solutions to achieve objectives and overcome potential pitfalls therein.

[redacted] vice president of Business Development for Bigband Networks, Inc., formerly held the same title at nCUBE Corporation when he worked on a project with the petitioner. He states:

> EBS assigned [the petitioner] a highly complex and truly groundbreaking challenge: to coordinate and launch Video on Demand trial service in four cities across the United States. nCube was engaged in the project to provide its hardware and software to facilitate development and integration.
>
> Again, this was a unique and pioneering project in the broadband industry – no company had successfully implemented such a radical, technologically complex service over a Digital

> Subscriber Line (DSL) connection. [The petitioner] approached his responsibilities with consummate skill. . . .
>
> EBS designed and implemented this innovative service in only six months – an extraordinary accomplishment by any standard.

United States Senator [redacted] offers a letter in support of the petition, but she does not appear to claim any personal familiarity with the petitioner or his work. Rather, she prefaces her assertions with statements such as "It is my understanding. . . ." Sen. [redacted] essentially repeats points from the other letters, adding, with reference to the petitioner's present work for Microsoft, "the largest operating systems technology company in the world has put its trust in [the petitioner] to lead one of their premier home service products into the 21st Century." She adds: "I understand that [the petitioner] has been identified by leading business figures in the world as one who possesses the highest level of competence in his field of national/international financial analysis expertise." Sen. Cantwell does not identify the "leading business figures."

The director instructed the petitioner to submit additional evidence to meet the guidelines set forth in *Matter of New York State Dept. of Transportation*. The director requested documentary evidence to support some of the claims made by the witnesses. For example, the director requested "an attestation from an officer of the bankruptcy court" relating to the petitioner's involvement with [redacted]inances (Enron's bankruptcy was a major news story early in the decade), and "copies of published material from trade magazines" relating to the petitioner's claimed importance to the implementation of broadband technology. In response, counsel states:

> Clearly, [the petitioner] has had a huge impact in his field. First, the adjudicator must understand that [the petitioner's] inestimable contribution to the delivery of digital content distribution in the broadband industry is NOT with the technology. Technology magazines . . . do not write about the business and operation executer who made it possible to bring this technology to market.

The assertion that technology magazines do not cover business figures is reasonable enough, but counsel then goes on to observe that [redacted] and many of its officials, garnered heavy press coverage as business leaders before that company's financial crisis became apparent. Counsel specifically mentions *Fortune* magazine. Counsel is, therefore, clearly aware that *business* publications (as opposed to *technology* publications) took an interest in [redacted] activities; but there is no indication at all these business publications took any notice at all of the petitioner's work. Counsel asserts that the petitioner's work with EBS' video on demand trial "was being closely watched by experts in the field," but offers no objective documentary support for this assertion, despite the director's earlier notice specifically requiring documentary support for claims of this nature.

The petitioner submits new witness letters. [redacted] states:

> I have worked at Microsoft since July 1989. . . . Until October 2003, I was General Manager of the Windows eHome Division [of] the Microsoft Corporation. In October 2003, I was appointed to oversee global marketing for Original Equipment Manufacturers (EOM) [sic], including the largest multinational electronics developers: Hewlett-Packard, Sony, Toshiba, Samsung, and NEC. . . .
>
> I led Microsoft's effort to recruit [the petitioner] while I was General Manager of the Windows eHome Division. I recognized that [the petitioner's] original work implementing

[redacted] Broadband Services (EBS) Video on Demand trial in late 2000 gave him a unique set of skills and knowledge that was key to bring to Microsoft's effort to position Windows as the best platform to deliver digital entertainment to every home. [redacted] as it became public knowledge, was not positioned to financially sustain that effort, but we knew that Microsoft could give [the petitioner] the proving ground to bring his work to fruition. He proved us right.

Almost immediately after joining the company, he led the negotiations between Microsoft and Movielink to devise a model solution for the secure delivery of movies to PC users in a new way. Movielink represents a joint venture between [five major film studios]. This transaction between Microsoft and Movielink represented a significant milestone for both companies. . . .

[The petitioner's] groundbreaking work on content delivery via broadband channels prior to joining Microsoft, and the knowledge he developed, was essential to successfully complete this complex negotiation between Microsoft and Movielink. As a result of the agreement, Movielink built a customized version of traditional online movie rental services. . . .

This major development in content delivery directly to consumer homes is another sign of the gradual transformation of the traditional media industry into a modern on-demand media industry that puts the consumer in control. [The petitioner] continues to provide the invaluable service of removing the obstacles to a successful source of revenue for film studios in a way that both protects the industry from loss of their valuable intellectual property, and enables the industry to adapt to, and pursue the vast on-demand home entertainment consumer market.

[redacted] vice president of business development for Movielink, states:

Movielink is one of a kind. It is the first partnership between the country's leading film studios dedicated to delivering movies over broadband internet connections to end users' PCs. One of the challenges of our business was to find a way to deliver our services to end users without forcing them to sit in front of their PC with a keyboard and a mouse. As a result of [the petitioner's] leadership driving the commercial relationship between Microsoft's Windows Division and Movielink, now any broadband subscriber nationwide who buys a PC running Windows XP Media Center Edition 2004 is able to have full access to Movielink's service using their remote control from the comfort of their couch and browse, preview, order and watch movies from the comfort of their couches displayed to either a TV screen or PC monitor. This completely changes the experience and represents a breakthrough that revolutionizes the way people can experience and consume entertainment. . . .

Prior to joining Microsoft, [the petitioner] implemented some of the first broadband content delivery models in the United States. These models, while cut short due to Enron's demise and the bursting of the internet bubble, have nonetheless greatly contributed to the current growth of broadband content on-demand consumers, which is expected to be an important driver in the film industry's growth in years to come. . . .

His contribution to the integration of Movielink's service and Windows has, and will continue to, enable new ground to be broken in terms of offering end-users (consumers) a

vastly more diverse range of options in customizing the viewing of entertainment and media products.

[redacted]senior director of National Core Video Marketing at Comcast Corporation, states:

> The current convergence of the PC and Consumer electronics industries as well as the wide adoption of high speed internet creates both a new set of challenges and opportunities that makes this an incredibly exciting time in our industry. [The petitioner], who currently is responsible for the business development activities of Microsoft's Windows eHome Division, is at the forefront of the changes that are enabling completely new scenarios for end users to receive and consume entertainment.
>
> In this respect, [the petitioner] has been responsible for driving the business relationships between the Windows operating system and the major cable companies in the United States. Specifically, leveraging his expertise in implementing solutions for the delivery of premium digital content and movies securely over broadband connections, he is now leading Microsoft's effort to work with the cable industry to enable, for the first time ever, the reception of digital television to Windows-based PCs, thereby eliminating the need for set top devices, and generating large savings in capital expenditure for United States cable providers and consumers.

The director denied the petition, asserting that some of the petitioner's claims lack corroboration, even after the director had requested the necessary evidence. The director also noted, with regard to the EBS broadband pilot project, the initial submission stressed the petitioner's involvement in the project; only later did witnesses reveal that the project collapsed when Enron's bankruptcy became impossible to conceal. Regarding his current work with Microsoft and Movielink, the director observed that much of this work took place after the petition's filing date, and therefore cannot establish that the petitioner was already eligible for the benefit sought at the time of filing.

On appeal, counsel states that the petitioner had submitted "[a] heavily documented and complete response" to the director's request for evidence. That response consisted of three witness letters and a letter from counsel; the response included no objective documentary evidence. We do not consider such a response to be "heavily documented."

The first 13 pages of counsel's 16-page appellate brief consist almost entirely of passages copied verbatim from the response to the director's request for evidence. Some of these passages are repeated twice; for instance, a paragraph that first appeared on page 2 of counsel's earlier response appears again, identically worded, on pages 4-5 and 13 of the appellate brief. Because these arguments were set forth *before* the director denied the petition, we cannot realistically consider these same recycled paragraphs to represent substantive *responses* to that denial.

In response to the director's observation that much of the petitioner's work at Microsoft took place after the petition's filing date, counsel observes: "The development of [the petitioner's] business plan occurred prior to the filing of this petition. . . . The implementation of the business plan is not at issue." We note[redacted] earlier statement to the effect that he had recruited the petitioner in order to involve him in this project. Because the petitioner joined Microsoft prior to the filing date[redacted] letter is consistent with the assertion that the project now underway was, at the very least, in the planning stages before the filing date.

At the same time, we cannot ignore the fact that, when the petition was first filed, the record of proceeding contained no mention of the Movielink project at all. Had the director considered the petitioner's initial submission to be sufficient, then the petition would have been approved without any discussion of the Movielink project. It remains, therefore, that the discussion of the Movielink project rests on information not contained in the initial filing, and the introduction of this discussion *after* the filing date represents a material change in the description of the petitioner's work and its significance.

Even the petitioner's own resume, which is, by design, a document intended to spotlight one's most important achievements, does not mention the project. Combined with the total absence from the record of any *documentary* (rather than testimonial) evidence about the petitioner's activities, the petitioner's failure to mention the Movielink project in his initial filing raises questions as to whether the petitioner was involved in that project at all as of the filing date. His subsequent involvement in the project would constitute a material change. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998), and *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971).

Counsel states "Microsoft would not choose an individual to head up the development of a new department unless they were sure he was at the very top of his field. Movielink would not agree to take on a project of this magnitude without being thoroughly convinced of the individual's extraordinary ability and capacity for success. The adjudicator is NOT qualified to refute these experts." The first two sentences in this statement are unsupported conjecture by counsel, and the third sentence is a *non sequitur* because the preceding sentences discussed alleged corporate policy of two companies, rather than the statements of any individual "experts." Furthermore, with regard to the witness letters, the witnesses' expertise lies in areas other than immigration law and policy. The decision of whether to grant immigration benefits lies with CIS, and private companies and individuals are not in the position to decide which petitions should be approved. Deference to witness expertise does not translate into uncritical approval of every petition supported by expert recommendations.

The director, in denying the petition, had noted that most of the witnesses who work in the petitioner's field have close ties to the petitioner. Counsel asserts that the statements from these witnesses should carry substantial weight because they are "top officials" of major corporations. It remains that we must distinguish between activities that are truly in the *national* interest, and activities that will primarily benefit one particular company or group of companies by giving it (or them) a competitive edge over other U.S. companies that seek to provide comparable products or services.

The record does not show that the petitioner is responsible for the existence or viability of the Movielink project as a whole; the launch of Movielink predates the petitioner's employment by Microsoft. [redacted] reference to "traditional online movie rentals" shows that online broadband delivery of motion pictures is not a new innovation for which the petitioner is responsible. Indeed, counsel has emphasized that the petitioner's expertise is not technological. Rather, the petitioner's work involves only one particular project between Microsoft and Movielink, which will benefit only individuals who own specific Microsoft software. The petitioner has not shown that his efforts will have an impact on the broadband industry to an extent that will benefit the *national* interest, rather than that of his employer and its clients (who gain market share at the expense of competitors). When several United States companies compete in a given market, it is not a national interest issue to assure that one particular company (however high its profile) is dominant in that market.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.